

**In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.**

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E. P. McDOWELL, Doing Business Under  
the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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BRIEF FOR DEFENDANT IN ERROR.

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JOHN L. SLATTERY,  
United States Attorney,

RONALD HIGGINS,  
Assistant United States Attorney,

W. H. MEIGS,  
Assistant United States Attorney,

*Attorneys for Defendant in Error.*



No. 3865.

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STATEMENT OF FACTS.

There is no dispute as to the facts involved in this case, as they were agreed upon (Tr., 19-22). From the agreed statement it appears that on January 31, 1921, in the State and District of Montana, the automobile involved herein was being used by one Stuper in

the transportation and removal of a quantity of distilled spirits, to wit, Canadian whiskey, imported into the United States, and upon which whiskey the Internal Revenue tax, then imposed by law, had not been paid and was then due, and that no permit had been issued entitling Stuper to so transport such whiskey.

McDowell's interest is that of a vendor who reserved title to the car until final payment had been made by Stuper, and that such final payment had not been made.

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## ARGUMENT AND AUTHORITIES.

Though four errors are assigned, but one is urged, and the sole question before this court is whether or not Section 3450 of the Revised Statutes of the United States has been repealed by implication by the passage of the National Prohibition Act. This identical question has been passed upon by numerous Federal District Courts and certain Circuit Courts of Appeal. One line of decisions holds in favor of such repeal, while the other rejects such construction. In a number of cases decided by Judge Bourquin in the District Court for Montana, he has consistently held against such repeal, and the reasoning and argument advanced by him in such decisions appear to be more sound and more consistent with the apparent intention of Congress in enacting the National Prohibition Act than the reasoning and arguments in the cases which adhere to the opposite view.

No useful purpose would be here served by quoting from the decisions of Judge Bourquin or from the de-

cisions of other courts in harmony with his views, as the number of cases on both sides of the question is limited and it will be assumed that this court would prefer to read such cases rather than excerpts from them.

The following are cited as best illustrating the cogent reasons why the contention for the implied repeal of Section 3450 *supra*, is unsound:

U. S. vs. One Cole Auto (D. C. Mont.), 273 Fed., 934;

U. S. vs. One Buick Roadster, et al (D. C. Mont.), 280 Fed., 517;

Reo Atlanta Co. vs. Stern (C. D. Ga.), 279 Fed., 422;

Payne vs. U. S. (5th C. C. A.), 279 Fed., 112;

Tuscan (D. C. Ala.), 276 Fed., p. 55;

U. S. vs. One Essex Touring Auto (D. C. Ga.), 276 Fed., 28;

U. S. vs. One Haynes Auto (D. C. Fla.), 268 Fed., 1003.

The rule that repeals by implication are not favored is axiomatic and does not require citation of authorities.

From the agreed statement of facts herein, the conclusion inevitably flows that Stuper was using the automobile for the purpose of removing and transporting the untax-paid whiskey in violation of Section 3450 *supra*, namely, "with intent to defraud the United States" of the taxes then due on the whiskey. The National Prohibition Act does not provide a penalty

for an act done with intent to defraud the United States of any tax imposed upon whiskey. In fact, Section 35 of the National Prohibition Act specifically provides that the act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in intoxicating liquor. It may well be said, then, that the National Prohibition Act is not only not inconsistent with Section 3450 *supra*, but that by Section 35 above referred to, it clearly recognizes its existence and declares for its future operation.

It is submitted that Section 3450 *supra* has not been repealed by the National Prohibition Act, and that the facts in this case, as agreed upon, bring it squarely within the provisions of said section, and that the judgment of forfeiture in favor of the government is correct and should not be disturbed.

Respectfully submitted,

JOHN L. SLATTERY,  
United States Attorney,

RONALD HIGGINS,  
Assistant United States Attorney,

W. H. MEIGS,  
Assistant United States Attorney,  
*Attorneys for Defendant in Error.*